

**CITATION:** Hassan v. Sun Life, 2023 ONSC 7280  
**COURT FILE NO.:** CV-22-00001003-0000  
**DATE:** 20231229

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** Layla Hassan, Plaintiff

**AND**

Sun Life Assurance Company of Canada, Defendant

**BEFORE:** Justice Spencer Nicholson

**COUNSEL:** M. Forget, for the Plaintiff

L. Plumpton and T. Weyman, for the Defendant

**HEARD:** August 23, 2023

**REASONS**

**NICHOLSON J.:**

- [1] This is a summary judgment motion with respect to whether or not the plaintiff, Layla Hassan, commenced an action against the defendant, Sun Life Assurance Company, within the statutory limitation period created by the *Limitations Act, 2002*, SO 2002, c. 24, Sch B (the “*Act*”). The action is in respect of Sun Life’s denial of long-term disability benefits.
- [2] Sun Life asserts that the statement of claim was not served within 6 months of the date of its issuance and moves to strike the claim on that basis. The plaintiff moves for an order validating service of the statement of claim.
- [3] The plaintiff also argues that the motion for summary judgment was brought by Sun Life prior to delivering a statement of defence, such that the motion for summary judgment cannot proceed.

**Background:**

- [4] Ms. Hassan developed bone cancer as a child, resulting in the amputation of her left leg with a hemipelvectomy. Nonetheless, she was able to graduate from law school and in March of 2012, she was hired by Legal Aid Ontario, providing duty counsel services in family and criminal cases. Ms. Hassan was insured through her employment with the defendant, Sun Life.

- [5] Ms. Hassan missed time from her employment commencing April 18, 2017. She then returned to work on regular part-time duties on May 15, 2017. She worked modified hours until June 11, 2017, and then stopped working completely. Her regular salary was paid to August 17, 2017, by her employer. On July 26, 2017, Ms. Hassan submitted a claim for Long Term Disability Benefits (“LTDs”) to Sun Life, alleging total disability as of April 18, 2017, due to left arm and shoulder pain, anxiety, depression and phantom limb pain.
- [6] The history of the claims handling is set out in the Affidavit of the Disability Claims Consultant (the “Consultant”) for Sun Life in considerable detail. Parts of the plaintiff’s application took some time to be completed and filed with Sun Life. Eventually, the Consultant assessed the plaintiff’s claim on September 25, 2017. Her conclusion was that Ms. Hassan did not satisfy the definition of “total disability” throughout the applicable elimination period provided for in the policy. The Consultant sent a letter dated September 26, 2017, to the plaintiff advising her that her claim for LTDs had not been approved and setting out the reasons for the denial. There is no issue that Ms. Hassan received the letter.
- [7] The September 26, 2017 letter set out an appeal process, under the heading “Appeal process” in bold font. The letter states as follows:
- “By considering an appeal, we are not waiving any rights under the benefit plan, including our right to rely upon any applicable limitation period. Since our decision to deny your claim is final (unless reversed on appeal), the limitation period begins to run from the date of this letter and will continue to run, without interruption, through any appeal process. If you decide to take legal action against Sun Life, please be advised that your claim is subject to a limitation period. This limitation is set out in the Limitations Act, 2002.”
- [8] I note that the actual policy of insurance does not contain any appeal procedure. The policy does contain references to limitation periods, incorporating “legislation as may apply to a claim, action or proceeding for insurance money”.
- [9] On September 27 and 28, 2017, Ms. Hassan called the Consultant and left messages for her as she was away on vacation. The Consultant returned Ms. Hassan’s call on October 16, 2017. According to the evidence of the Consultant, Ms. Hassan was very upset during the call with Sun Life’s decision. Ms. Hassan reportedly stated that the Consultant would be “hearing from my lawyers”. On her cross-examination, Ms. Hassan confirmed that she “went crazy” and lashed out at the Consultant. She did not recall telling the Consultant that “she would be hearing from her lawyers”.
- [10] On November 25, 2017, Ms. Hassan emailed the Consultant some photographs depicting her amputation and also further described her pain and other symptoms. On December 4, 2017, the Consultant wrote to Ms. Hassan and advised her that the photographs were insufficient to support an appeal. The Consultant requested new or additional medical documentation in support of an appeal. The December 4, 2017 letter included the following:

“Please be advised that your claim is subject to a limitation period set out in the Insurance Act of the province (excluding Ontario) or territory in which you resided at the time that you initially became insured under this group contract. If you became insured in Ontario, the limitation period is set out in the Limitation Act or your employee booklet, where your booklet includes a limitation period provision. If you decide to take legal action against Sun Life, please be advised that your claim is subject to a limitation period. This limitation is set out in the Limitations Act, 2002 or in the applicable contractual provisions.”

- [11] On December 4, 2017, the plaintiff forwarded 134 pages of medical documentation to Sun Life. These did not change the Consultant’s view that Ms. Hassan did not meet the definition of “total disability”.
- [12] On December 13, 2017, the Consultant wrote to Ms. Hassan and advised her that Sun Life was unable to reconsider its previous assessment and its file remained closed. The letter included the identical warning about the limitation period contained in the December 4, 2017 letter, this time italicized.
- [13] On January 31, 2018, the Consultant was contacted by email and voicemail message by Dana Fisher from Legal Aid Ontario, stated to be the “Elected Representative for the Plaintiff”. Ms. Fisher is a lawyer. Ms. Fisher requested a copy of the plaintiff’s LTD file. Given that there was no authorization, the Consultant did not provide the file. On February 2, 2018, Ms. Fisher emailed an authorization form signed by the plaintiff, authorizing the release of medical information to the Plaintiff’s union, or their legal representative, Cavalluzzo Law firm.
- [14] On February 14, 2018, the plaintiff sent an email to the Consultant with the subject line of “RE: Limitation Period”. Ms. Hassan wrote “Please advise as to the limitation period for my appeal”. The Consultant responded on February 15, 2018, by stating:

“All appeals muse (*sic*) be filed in timely fashion, without undue delays.

Please refer to our initial decision letter dated September 26, 2017, stating “By considering an appeal, we are not waiving any rights under the benefit plan, including our right to rely upon any applicable limitation period. Since our decision to deny your claim is final (unless reversed on appeal), the limitation period begins to run from the date of this letter and will continue to run, without interruption, through any appeal process. If you decide to take legal action against Sun Life, please be advised that your claim is subject to a limitation period. This limitation is set out in the *Limitations Act, 2002*.”

- [15] The plaintiff’s LTD file was sent to Ms. Fisher on March 7, 2018. In back-and-forth correspondence between Ms. Fisher and the Consultant, Ms. Fisher inquired further about how to escalate the appeal process. In an email dated April 2, 2018, Ms. Fisher identified

herself as “an elected member for the Legal Aid Ontario staff lawyers Local with the Society of United Professionals (formerly the Society of Energy Professionals). I am representing Layla Hassan in her appeal of LTD benefits”.

- [16] The statement of claim in this action was issued on December 13, 2019. That statement of claim was not served within six months as provided for under the *Rules of Civil Procedure*. The statement of claim was forwarded via email to the Consultant by Ms. Hassan’s legal counsel at the time, Mr. Baksh, on January 27, 2021. That was the first time Sun Life was aware of the action.
- [17] Sun Life acknowledges that effective March 16, 2020, due to the pandemic, it began accepting service of statements of claim by email.
- [18] Mr. Shantz, counsel for Sun Life, wrote to Mr. Baksh on February 8, 2021, requesting a copy of the Order extending time for service of the statement of claim. Alternatively, Mr. Shantz indicated that if Mr. Baksh was going to bring a motion to extend the time for service, he would like to be provided with a copy of the notice of motion. Mr. Baksh did not respond to this letter.
- [19] Mr. Shantz sent a further letter dated March 4, 2021, in the same vein. Mr. Shantz indicated that his instructions were to move to have the action dismissed if the non-compliance with the *Rules* was not remedied. No response was forthcoming to this letter.
- [20] A draft notice of motion was served by Mr. Shantz upon Mr. Baksh on March 31, 2021, to dismiss the action for failing to serve it within the time prescribed by the *Rules*.
- [21] In late March 2021, Mr. Baksh contacted Mr. Shantz and advised him that Mr. Pickard had been retained to deal with the motion. Mr. Pickard was retained by LawPro.
- [22] Communication between Mr. Pickard and Mr. Shantz ensued. Mr. Pickard indicated that he intended to bring a cross-motion to validate or extend the time for service of the statement of claim.
- [23] Mr. Shantz and Mr. Pickard agreed that all issues should be addressed at one hearing. This included Sun Life’s motion to summarily dismiss the action on the basis that it was commenced outside the applicable limitation period.
- [24] Ms. Hassan retained new counsel, Ms. Hull, in April of 2021. This created some confusion on the part of Mr. Shantz on which of the two lawyers he should communicate with.
- [25] By letter dated September 15, 2021, Ms. Hull demanded that Sun Life provide its statement of defence. Sun Life was hesitant to do so, given that it did not wish to prejudice its argument about service of the claim outside the time provided for by the rules.

[26] Mr. Baksh has sworn an affidavit in support of the plaintiff. He indicates that the statement of claim was issued during the pandemic. His offices were closed during the lockdown, and he failed to serve the claim in time. It was not an intentional decision by him or Ms. Hassan not to serve the statement of claim. I note that in cross-examination, Mr. Baksh admitted that he had been working from home for a few years before the statement of claim was issued. I find that little turns on this inconsistency.

[27] There are a number of other relevant pieces of evidence, which are the following:

- There is a copy of a letter addressed to Ms. Hassan from Sun Life dated September 1, 2017, which was provided by her to her physician. There is handwriting on the letter, which Ms. Hassan confirmed was hers. Ms. Hassan has placed a “star” on the paragraph referring to the limitation period and underlined the “Limitations Act, 2002”, as well as written the words “Limitations Act” on the page. She has also circled deadlines by which she was to submit information for her appeal (September 22, 2017).
- There is a report from Ms. Hassan’s treating psychiatrist dated October 30, 2017. The doctor writes “[s]he planned to initiate legal proceedings against LAO and her insurer”. On cross-examination, Ms. Hassan indicated that it was true she planned to sue both Legal Aid Ontario and Sun Life for the long-term disability benefits.
- Ms. Hassan was dissatisfied by the assistance she was receiving from Ms. Fisher by the spring of 2018. On cross-examination, Ms. Hassan testified that she sent her file to her father, who is a lawyer, for advice but he did not take any action on her behalf. She contacted Mr. Baksh in August of 2019. This was months after she spoke to her father.
- Ms. Hassan testified that when she first met with Mr. Baksh in August of 2019, he told her that he should be starting a claim right away. She also testified that she instructed Mr. Baksh to commence a lawsuit in August of 2019.

[28] In Ms. Hassan’s affidavit, she stresses that she was told that the denial of her LTD claim was final, unless it was reversed on appeal. She therefore concluded that the decision was not final given that it could still be reversed on appeal. She believed that the denial of her LTD claim was only final if she did not pursue an appeal. She states that she did not believe that she had to start a lawsuit until the appeal was denied.

[29] Ms. Hassan indicates that it was not until December 13, 2017, that Sun Life advised her that her appeal was denied. Thus, she argues that the issuance of the statement of claim on December 11, 2019, was within the two-year limitation period. She also describes the reference to the *Limitations Act, 2002* in the letters as “vague”.

### **Preliminary Issues:**

[30] Sun Life argues that the claim should be dismissed because the statement of claim was not served within six months of the date of issue. The plaintiff has brought a cross-motion to

validate service. If I were to dismiss the action on this basis, there would arguably be no reason to deal with the summary judgment motion on the limitation period.

- [31] The plaintiff argues that Sun Life cannot bring a motion for summary judgment because it had not filed a statement of defence prior to serving the motion. I note that Sun Life did file a statement of defence on May 11, 2023, but not until after the motions had been served and filed and scheduled. The plaintiff objects to the court considering the statement of defence that has now been filed.
- [32] I intend to deal with the following issues:
- (a) Should the action be dismissed on the basis that the statement of claim was not served within the time set out in the *Rules* or should service be validated?
  - (b) Can Sun Life bring a summary judgment motion, or continue its summary judgment motion, without first delivering a statement of defence?
  - (c) Is there a genuine issue requiring a trial with respect to whether or not the plaintiff's action was commenced after the expiration of the limitation period?

**Issue 1: Should the action be dismissed on the basis that the statement of claim was not served within the time set out in the *Rules* or should service be validated?**

- [33] Rule 14.08 of the *Rules of Civil Procedure* stipulates that where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued.
- [34] As a result of the COVID-19 pandemic, the running of time in court proceedings was suspended effective March 16, 2020. The suspension was then lifted effective September 14, 2020.
- [35] As the statement of claim was issued on December 13, 2019, under normal circumstances it was to be served no later than June 13, 2020. However, due to COVID-19, this was extended to approximately December 14, 2020.
- [36] The statement of claim was served, without leave, on January 27, 2021. Although Sun Life describes that more than thirteen months had elapsed by the time of service, due to the suspension of time, service was only outside the time for service by approximately six weeks. This can hardly be described, in my view, as an egregious passage of time.
- [37] Rule 3.02 permits the court to extend or abridge any time prescribed by the *Rules* on such terms as are just. The motion to extend time may be made before or after the expiration of the time prescribed.

[38] The cases set out the following factors to be considered in determining whether or not it is just to extend the time for service of a statement of claim:

- a) Whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against him;
- b) Whether or not the plaintiff moved promptly for an extension of time after the period expired;
- c) Whether or not it was reasonable for a defendant to infer from all the circumstances that the plaintiff had abandoned his claim;
- d) Whether or not the delay in serving the claim resulted from the direction, participation or involvement of the plaintiff personally in the service of the claim; and
- e) Prejudice to the defendant.

(see: *Pagliuso v. Primerica Financial Services Ltd.*, 2019 ONSC 460, at para. 16, citing *Tarsitano v. Drutz*, 2013 ONSC 5605 at para. 22).

[39] In my view, an examination of the factors weighs in favour of extending the time for service of the statement of claim in this case.

[40] Unlike in *Pagliuso*, or in *Gupta v. Chacko*, 2020 ONSC 1457, Ms. Hassan did not make a deliberate decision to not serve the statement of claim. Rather, this is a case of solicitor's inadvertence in failing to serve the statement of claim, exacerbated by the fact that the world was experiencing a generational pandemic disrupting his office and Ontario courts. It is not unfathomable that such a slip might occur in these circumstances.

[41] I also note that Sun Life was well aware that Ms. Hassan disputed their denial of the claim, as she continued to file material to appeal their decision and had communicated with them in a fashion that made clear that she disagreed with their decision. Ms. Fisher had reached out to Sun Life on Ms. Hassan's behalf. Despite the passage of time between the issuance of the statement of claim and when Mr. Baksh finally forwarded it to Sun Life, this action cannot be said to "have come out of the blue."

[42] The primary concern of the court is whether the defendant has suffered any prejudice or unfairness by the passage of time. Much of Mr. Baksh's affidavit was aimed at demonstrating that all of the evidence to support or refute Ms. Hassan's entitlement to LTDs remains available. The defendant's material does not allege any prejudice. Indeed, counsel conceded that there was no significant prejudice when directly asked by the court during oral argument.

[43] Finally, I do not place significant weight on Mr. Baksh's failure to respond to Mr. Shantz when Mr. Shantz inquired about whether a motion to extend was contemplated, and when Mr. Shantz threatened to bring a motion. I infer that Mr. Baksh was reaching out to LawPro. Mr. Pickard was retained by the end of March 2021, within a short period of time. Once Mr. Pickard was retained, I am satisfied that he and Mr. Shantz agreed that all of the

motions should be done at the same time, which adequately explains the delay in bringing the motion to extend.

[44] Accordingly, I grant leave to extend the time for service of the statement of claim.

**Issue 2: Can Sun Life bring a summary judgment motion, or continue its summary judgment motion, without first delivering a statement of defence?**

[45] Rule 20.01 of the *Rules of Civil Procedure* describes the circumstances in which a party may bring a motion for summary judgment. In respect of defendants, rule 20.01 (3) provides as follows:

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

[46] On the face of this rule, a pre-requisite for a defendant to bring a motion for summary judgment is filing a statement of defence.

[47] The plaintiff points out that the defendant knew that it had to file a statement of defence prior to bringing a motion for summary judgment because the defendant sought leave to move for summary judgment without having delivered a statement of defence in its notice of motion.

[48] The plaintiff relies upon *Bondy-Rafael v. Potrebic*, 2015 ONSC 3655, 128 O.R. (3d) 767 (Ont. Div.Ct.) and *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788, 153 O.R. (3d) 465, two decisions dealing with whether the court could bifurcate a trial without the consent of both parties. Rule 6.1.01 specifically requires the consent of both parties for a judge to bifurcate a trial. In those cases, it was held that the court could not rely on its inherent jurisdiction to control its processes to override the clear wording of rule 6.1.01. It was not open to the court to bifurcate a trial absent the consent of the parties.

[49] The plaintiff also relies upon *McKenna v. Gammon Gold Inc.* 2009, 183 A.C.W.S. (3d) 90 (Ont. S.C.). In that case, Strathy J. (as he then was) was presiding over a putative class proceeding. On the eve of the certification motion, the defendant proposed to bring a summary judgment motion at the same time. Strathy J. gave five reasons why the summary judgment motion should wait until after the certification hearing. In paragraph 22, the fourth reason is described as the failure of the defendant to have pleaded. It was noted that the plaintiff was entitled to know the specific defenses being asserted prior to being required to respond to the motion.

[50] The defendant relies on a decision of Howard J., *Chittle v. Estate of Chittle*, 2018 ONSC 4139. In that case, the parties had agreed that the time for serving a statement of defence would be extended to allow for ongoing settlement discussions. The very issue before the



court on the summary judgment motion was whether a binding settlement had been achieved. Howard J. rejected the plaintiff's argument that the motion could not proceed but did so on the basis that the motion could also have been framed as a motion to enforce a settlement under rule 49.

- [51] Importantly, in *Chittle*, the plaintiff had not raised in advance of the summary judgment motion that it would be arguing that it must fail on the basis that the defendants had not filed a statement of defence. Howard J. described this as a technical argument and utilized rule 2.03 to "dispense with compliance with any rule at any time". He also relied upon the court's obligation under rule 1.04(1) to liberally construe the rules to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
- [52] The case before me is complicated by the role of LawPro counsel, Mr. Pickard. He was involved for the benefit of Mr. Baksh but was tasked with bringing the motion to extend time for service of the pleadings. Ms. Hull was retained by Ms. Hassan on April 22, 2021 to pursue the claim for LTDs. Ms. Hull demanded a statement of defence on September 15, 2021, from Sun Life.
- [53] Despite Ms. Hull's retainer, it is clear that Mr. Pickard had carriage of these motions on behalf of the plaintiff. I am satisfied that Mr. Shantz and Mr. Pickard had agreed that these motions should proceed together. As early as April 6, 2021, correspondence between them confirms that they agreed to bring the motion to dismiss the action for delay in service and the motion to validate service at the same time. On April 14, 2021, Mr. Pickard wrote to Mr. Shantz and stated:

"It was a pleasure speaking with you concerning this matter.

As I stated, I am agreeable to having all the motions heard together rather than as three separate motions." (emphasis added)

- [54] Accordingly, it is clear that Mr. Shantz and Mr. Pickard agreed to proceed with all three motions at the same time. It is also clear from correspondence from Ms. Hull dated April 23, 2021 that she was alive to the limitation issue.
- [55] While Ms. Hull subsequently demanded a statement of defence in her correspondence dated September 15, 2021, it is clear that Mr. Pickard was handling all of these motions on behalf of Ms. Hassan. In his correspondence to Mr. Shantz dated September 24, 2021, Mr. Pickard sets out his proposal for how all three motions would proceed. He wrote as follows:

"I suggest for the sake of efficiency, you bring one motion to dismiss the action for failure to serve the Statement of Claim in time and because the action is statute barred. I can then respond, including the cross-motion as stated above."

- [56] At some point, Mr. Pickard was replaced by Mr. Forget. I note that they both practiced at the same law firm. The failure of Sun Life to file a statement of defence as a bar to this motion was not raised at any point prior to Mr. Forget's delivery of the factum in support of this motion, dated January 16, 2023.
- [57] In my view, *Bondy-Rafael* and *Duggan* do not assist the plaintiff in this case. The key distinction between this case and *Bond-Rafael* and *Duggan* is that Mr. Pickard implicitly consented to the summary judgment motion being brought prior to the delivery of the statement of defence. The manner in which these motions proceeded was proposed by Mr. Pickard. Mr. Pickard, on behalf of the plaintiff, implicitly waived the requirement that Sun Life file a statement of defence when he and Mr. Shantz agreed upon how these motions would proceed. In my view, Mr. Forget, as Mr. Pickard's successor, is bound by that agreement. Parties are able to agree to waive strict compliance with the *Rules*. In *Bondy-Rafael* and *Duggan*, the very issue was that there was no consent to bifurcation, and therefore no such agreement existed.
- [58] Furthermore, the very purpose of rule 20 is to promote efficiency and cost-savings to the parties and *to the court* in cases where there is no genuine issue requiring a trial. Mr. Forget conceded in argument that if I dismissed the motion on the basis he is suggesting, I could preserve Sun Life's ability to re-file this motion after having served the statement of defence. In the circumstances of this case, given the agreement between Mr. Pickard and Mr. Shantz on how these motions would proceed together, to require the defendant to re-serve this motion is a complete waste of the parties' resources, and, just as, or more, importantly, judicial resources.
- [59] Court resources are not infinite. Substantial time was done by the court in preparation for the motion, a full hearing was completed and the decision reserved. To require a judicial colleague to re-do this process is inimical to *Hryniak*, rule 20, and rules 1.04 and 2.03, the purpose of which is to promote efficiency.
- [60] *McKenna* also does not assist the plaintiff. Again, Mr. Pickard consented to the motion being brought without a statement of defence being filed. Furthermore, in this case the summary judgment motion is brought solely on the basis of the expiration of the limitation period. It is disingenuous to suggest that the plaintiff "does not know the specific defences being asserted". Sun Life has made clear the basis for this summary judgment motion from the outset of the parties' dealings in this litigation.
- [61] Finally, Mr. Forget argues that the filing of a statement of defence would have given rise to the plaintiff's ability to conduct an examination for discovery and triggered the obligation to produce an affidavit of documents, which would have fleshed out some of the issues. Firstly, existing case law indicates that a party is not always entitled to have an examination for discovery prior to a summary judgment motion. Rule 20 is not limited to bringing a motion for summary judgment only after examinations for discovery are completed. Secondly, the plaintiff did not ask for, nor conduct cross-examinations on the defendants' affidavits, while the defendant did. Had the plaintiff wished to conduct

examination necessary to deal with this motion, she had ample opportunity to do so. Similarly, no requests for documentation were put in evidence.

- [62] In my view, the defendant sought leave to bring this summary judgment motion recognizing both the wording of rule 20 and trying to avoid being seen as waiving its argument based on the late service of the statement of claim. I do not ascribe any further motive than that.
- [63] Accordingly, given the manner in which Mr. Pickard and Mr. Shantz agreed that these motions would proceed, I would not dismiss the defendant's motion for summary judgment on the technical basis that Sun Life was required to file a statement of defence prior to bringing the motion. I find that the plaintiff, through Mr. Pickard, waived the requirement of Sun Life to file a statement of defence prior to bringing the motion for Sun Life. Furthermore, if necessary, I would resort to rule 2.03 in the circumstances of this case to dispense with strict compliance with rule 20.01. I find that it is necessary to do so in the interest of justice in this case.

**Issue 3: Is there a genuine issue requiring a trial with respect to whether or not the plaintiff's action was commenced after the expiration of the limitation period?**

- [64] The basic limitation period under the *Limitations Act, 2002* is two years from the date on which the claim was discovered. Sections 5 (1) and (2) of the *Act* provides as follows:

5(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

- (i) that the injury, loss or damage had occurred,
- (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
- (iii) that the act or omission was that of the person against whom the claim is made, and
- (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

- [65] Summary judgment shall be granted where there is no genuine issue requiring a trial. In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, it was held that there will be no

genuine issue requiring a trial when a judge is able to reach a fair and just determination on the merits of the action because the process:

- (1) allows the judge to make the necessary findings of fact;
- (2) allows the judge to apply the law to the facts; and
- (3) is a proportionate, more expeditious and less expensive means to resolve the case.

[66] In the context of a summary judgment motion based on s. 5 of the *Limitations Act, 2002*, the court is required to make specific findings of fact regarding the date the plaintiff is presumed to know the matters listed in s. 5(1)(a)(i)-(iv). This includes:

- (i) the day on which the act or omission on which the claim is based occurred;
- (ii) the date of actual knowledge under s. 5(1)(a), in the event the evidence proves the contrary of the presumptive date;
- (iii) the s. 5(1)(b) objective knowledge date, based on the reasonable person with similar abilities and circumstances analysis; and
- (iv) which of the actual knowledge and objective knowledge dates is earlier.

(see: *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, 142 O.R. (3d) 561, at paras. 32-39).

[67] As the following review of cases makes clear, whether a plaintiff has commenced an action after the expiration of a limitation period is amenable to resolution via a summary judgment motion.

Review of Case Law:

[68] The Court of Appeal has dealt with LTD claims and when the limitation period begins to run on several occasions.

[69] In *Kumarasamy v. Western Life Assurance Company*, 2021 ONCA 849, the insurer argued that the limitation period commenced when the insured received a letter closing his file for failing to submit an application for benefits. The insured argued that the limitation period started when he received a subsequent denial letter. The motion judge held in favour of the insured and found that he could not have discovered that a proceeding against the insurer was the appropriate means to remedy his loss until the insurer denied the LTD claim. Nordheimer J.A. held that the motion judge erred when she found that that the requirement that the plaintiff knew that a “proceeding would be an appropriate means to seek to remedy” the injury, loss or damage, was only satisfied when the appellant clearly and unequivocally denied the respondent’s claim.

[70] Nordheimer J.A., in paras. 28-29, relied upon *Thompson v. Sun Life Assurance Company of Canada*, 2015 ONCA 162,47 C.C.L.I. (5<sup>th</sup>) 287, which he noted stands for the proposition that the limitation period commences to run when the insured knew that he was injured, believed he was entitled to long-term disability benefits payments and knew that the insurer was not making those payments.

[71] At paragraph 31, Justice Nordheimer stated as follows:

[31] There is no authority for the proposition that a clear and unequivocal denial is required. It may be that there will be some cases where an insurer may, by its conduct, lead an insured person to believe that their claim has not been denied (and thus litigation is not required). Those cases will likely be rare, and, in any event, this case is not one of them. The appellant did not do anything to lead the respondent into the belief that his claim was still alive and well. In fact, the appellant did the opposite. First, the appellant had told the respondent that his file had been closed. Second, when the issue was raised again, almost two years later, the appellant expressly told the respondent’s lawyers that, in undertaking its re-examination of the claim, the appellant was not waiving any applicable time limits.

[72] In *Clarke v. Sun Life Assurance Company of Canada*, 2020 ONCA 11, 149 O.R. (3d) 433, the insurer denied the insured’s claim for LTDs and informed her that there were three levels of appeal available to her. The appeal process was not a term of the plan of insurance but simply a practice that the insurer had put in place. The insured took advantage of this appeal process. The insurer maintained its denial and “closed” her file. Three years passed, and the insured then submitted further documentation in support of her claim for LTDs. The insurer advised her that “her request for a review of our decision is now being considered at the first level of appeal”. That appeal was unsuccessful, and the insurer closed its file once again. In doing so, the insurer advised the insured that there was still a final level of appeal and for the first time, advised her that her claim was subject to the limitation period set out in the *Limitations Act, 2002*.

[73] The motion judge dismissed the insurer’s summary judgment motion, describing the insurer’s initial denial as “equivocal”. In allowing the appeal in part, D.M. Brown J.A. stated, at para. 16, as follows:

[16] With respect, the motion judge erred in law by failing to apply the principle stated by this court in *Pepper v. Sanmina-Sci Systems (Canada) Inc.*, [2017] O.J. No. 4870, 2017 ONCA 730, [2018] I.L.R. para. I-5996, at para. 1, that an insured has a cause of action for breach of contract against her insurer when the insurer stops paying long-term disability benefits. In its February 24, 2014 letter, Sun Life informed Ms. Clarke that her disability benefits terminated as of April 25, 2013, which was the date the “Own Occupation” benefits period ended. Sun Life went on to state that it would not pay “Any Occupation” benefits. Accordingly, by February 24, 2014, a “loss, injury or damage” had occurred that would have been

known to a reasonable person with the abilities and in the circumstances of Ms. Clarke: *Limitations Act, 2002*, s. 5(1)(a)(i) and (b).

- [74] At para. 20, Justice Brown described that s. 5(1)(a) requires the court to make two findings of fact. The first is the “day on which the person with the claim first knew” all four of the enumerated elements of s. 5(1) of the *Act*. The court must keep the presumption in s. 5(2) in mind in doing so. Secondly, the court must also determine “the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known” of the four elements identified in s. 5(1) of the *Act*. Then, the *Act* requires that the earlier of those two dates is the date on which the claim is “discovered”.
- [75] I note that the Court described that the motion judge’s reasons disclosed that she was not able to determine when Ms. Clarke first knew that a proceeding would be an appropriate means to seek to remedy her injury. The Court left open the possibility that the informal appeal process offered by the insurer might preserve the limitation period and held that this required a trial to determine.
- [76] In *Pepper v. Sanmina-Sci Systems (Canada) Inc.*, 2017 ONCA 730, 283 A.C.W.S. (3d) 405, the Ontario Court of Appeal held that the date the insurer stopped paying long-term disability benefits to the insured was the date that the insured had a cause of action, and ought to have been aware that he did. In that case, there had been no formal appeal process for when a claim was denied but the insurer continued to review medical documentation as it was submitted.
- [77] A review of the motion judge’s decision in *Pepper v. Sanmina-Sci Systems (Canada) Inc.*, (2017 ONSC 1516, 276 A.C.W.S. (3d) 920, indicates that the insurer did not refer to a limitation period in its denial letter. Nonetheless, the appeal was allowed. The Court of Appeal stated, in para. 3, “[t]here is no obligation on an insurer to advise its insured about statutes of limitation and, in this case, the dealings between the appellant and the respondent in attempting to resolve the claim do not give rise to an estoppel argument”.
- [78] *Kassburg v. Sun Life Assurance Company of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, is a difficult case to reconcile with the aforementioned appellate decisions. I note that *Kassburg* was not addressed in *Kumarasamy* or *Clarke*. In *Kassburg*, the Court of Appeal upheld the motion judge’s decision that the limitation period did not begin to run until the insured had exhausted Sun Life’s internal appeal process. The Court of Appeal demonstrated considerable deference to the motion judge’s findings of fact regarding whether the claim had been clearly and unequivocally denied. The Court expressly declined to reweigh the evidence that was considered by the motion judge.
- [79] The defendant relies upon *Plastino v. Desjardins Financial*, 2022 ONSC 3730, a decision of Rasaiah J. This is also an LTD benefits case, with the ability of the insured to appeal through an informal appeal process. It was noted in that case that the informal appeal

process had no definite end that would set a limitation period on denial of the appeal. The court followed *Pepper* and dismissed the action as out of time.

- [80] The plaintiff relies upon *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321. That case is not an LTD case, rather it deals with a claim for tax credits from the Canada Revenue Agency. The Court of Appeal held that the motion judge erred by equating knowledge that the defendant had caused a loss with a conclusion that a proceeding would be an appropriate means to seek to remedy the loss. Had the plaintiff's appeal of the tax credits, which was being actively aided by the defendant, been successful, the plaintiff's loss would have been substantially eliminated and court proceedings would have been wholly unnecessary.
- [81] In *Presidential MSH Corp*, the Court of Appeal described several circumstances in which courts have held that legal action may not be "appropriate" for the purposes of s. 5(1)(a)(iv). This included when the defendant was an expert who was actively assisting to remedy the situation on behalf of the plaintiff. Another circumstance was where there is a statutory dispute resolution process that offers an adequate alternate remedy, and that process has not yet run its course or been exhausted.
- [82] *Presidential MSH Corp* was decided prior to *Pepper*, *Clarke* and *Kumarasamy*. The latter cases are all long-term disability benefits cases and are binding upon this court. In those cases, the presence of an appeal process did not pause the commencement of the limitation period.
- [83] I note that in *Presidential MSH Corp*, at para. 48, Pardu J.A. noted that if a plaintiff is going to rely on the exhaustion of some alternative process, such as an administrative or other process, as suspending the discovery of its claim, the date on which the alternative process has run its course or is exhausted must be reasonably certain or ascertainable by a court.
- [84] That certainty is lacking in Ms. Hassan's case.
- [85] In my view, *Presidential MSH Corp* and the LTD cases are reconcilable on the basis that in *Presidential MSH Corp*, there was both an appeal procedure with a defined end and the defendant was providing professional advice to the plaintiff to remedy the situation.
- [86] The plaintiff also relies upon *Western Life Assurance Company v. Penttila*, 2019 ONSC 14, 144 O.R. (3d) 198, a decision of the Divisional Court. *Penttila* bears substantial similarities with the case at bar: it is an LTD benefits case; the insurer had advised Ms. Penttila that she had the right to appeal their decision; and the insurer specifically stated that "in offering to review additional evidence, we are not waiving our right to rely on any statutory or policy provision including any time limitations".
- [87] In *Penttila*, the court distinguished *Pepper* on the basis that in *Pepper* litigation counsel had been retained by the plaintiff.

- [88] *Penttila* was decided prior to *Kumarasamy* and prior to *Clarke*. The motion judge in *Kumarasamy* had relied upon *Penttila* and been subsequently overturned on appeal.
- [89] While the Superior Court is bound by both the Divisional Court and the Ontario Court of Appeal, the Court of Appeal decisions are controlling. *Penttila* was decided without the benefit of the Court of Appeal decisions, particularly *Kumarasamy* where it was held that “there is no authority for the proposition that a clear and unequivocal denial is required” at para. 31. This seems entirely inconsistent with the result in *Penttila*.
- [90] The case of *Halladay v. Manufacturers Life*, 2020 ONSC 2802, relied upon by the plaintiff, is also an LTD benefits case. *Halladay* was released after *Clarke* but before *Kumarasamy*. It is not clear whether it was argued before or after *Clarke* was released. Only the motion judge’s decision in *Clarke* is referred to.
- [91] In *Halladay* there was an appeal procedure and there is no reference to a warning by the insurer about the limitation period. The ongoing appeal procedure, coupled with the absence of any mention by the insurer of a limitation period, is an important distinguishing feature in *Halladay* from the present case.

Application of the Legal Principles:

- [92] I find that I am bound by the recent Court of Appeal decisions in *Kumarasamy*, *Clarke* and *Pepper*.
- [93] The defendant asserts in this case that the limitation period commenced on September 26, 2017, the date that Sun Life first declined Ms. Hassan’s LTD claim. Sun Life’s alternative position is that the limitation period commenced on October 16 or October 30, 2017, when there is evidence that the plaintiff had knowledge that a legal proceeding was appropriate and that she intended to retain legal counsel.
- [94] Ms. Hassan argues that the limitation period, at its earliest, commenced on December 13, 2017, when Sun Life finally rejected Ms. Hassan’s appeal and “closed its file”. She argues that it was not reasonable within the window of September 26, 2017, and December 13, 2017, for her to have commenced an action because the appeal process had not yet run its course.
- [95] Respectfully, the latter assertion misstates the test. The limitation period does not commence simply based on when it is reasonable for a plaintiff to have started an action. The limitation period commences when the claim upon which the action is based was or ought to have been discovered.
- [96] I begin by noting that the presumptive date upon which the limitation period commences in this case is the date that Ms. Hassan received the September 26, 2017, letter. As



described in *Pepper*, an insured has a cause of action when an insurer refuses to pay the benefit claimed.

- [97] I find that Sun Life’s letter dated September 26, 2017, clearly denied Ms. Hassan’s claim for LTD benefits. That letter stated that her “claim was not approved” and explained Sun Life’s rationale for not approving her claim. The letter described their decision as “final (unless reversed on appeal)”. Although perhaps the inclusion of the brackets is confusing, the letter later stated:

“Therefore, since you do not meet the definition of continued total disability from your own occupation, as required by the terms of your policy, we are unable to consider benefits and your claim is declined”.

- [98] On any reasonable interpretation of the letter, I find that it was clear that Sun Life was refusing to pay to Ms. Hassan the LTDs to which she claimed entitlement.

- [99] Ms. Hassan admits to having received this letter. She admitted on cross-examination that she had read the letter, although she equivocated about whether she had read all of the letter. Even if she had not read all of the letter, she ought to have done so and cannot rely upon any failure to have done so. Clearly Ms. Hassan understood the import of the letter as it prompted two voice messages and an angry telephone call to the Consultant.

- [100] Section 5(2) of the *Act* places the onus upon Ms. Hassan to rebut the presumption that the limitation date commenced on this date. She may do so if she establishes that having regard to the nature of the loss, she, or a reasonable person with her abilities and in her circumstances, did not know the items listed from s. 5(1)(a)(i)-(iv).

- [101] Pursuant to *Pepper*, I find that as of her receipt of the September 26, 2017 letter Ms. Hassan knew that a loss had occurred and that the loss was caused by Sun Life’s refusal to pay LTD benefits pursuant to the policy of insurance. Therefore, all of 5(1)(a)(i)-(iii) are satisfied.

- [102] Thus, the analysis turns to whether Ms. Hassan, or a reasonable person with her abilities and in her circumstances first ought to have known that a proceeding would be an appropriate means to seek to remedy the loss as of her receipt of the September 26, 2017 letter.

- [103] *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, is regarded as the leading authority with respect to the meaning of “appropriate means” in s. 5(1)(a)(iv) of the *Act*. At para. 34, Sharpe J.A. stated as follows:

[34] This brings me to the question of when it would be “appropriate” to bring a proceeding within the meaning of section 5(1)(a)(iv) of the Limitations Act. Here as well, I fully accept that parties should be discouraged from rushing to litigation

or arbitration and encouraged to discuss and negotiate claims. In my view, when s. 5(1)(a)(iv) states that a claim is “discovered” only when “having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it”, the word “appropriate” must mean legally appropriate. To give “appropriate” an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess the tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.

- [104] Furthermore, paras. 2-6 in *Pepper* lead to the legal conclusion that where there is an informal appeal process with no reasonably ascertainable end date, subsequent appeals that are reviewed and responded to by an insurer do not reset or pause the limitation period from running. (see also: *Plastino, supra*, at para. 68). This eliminates the principal argument of the plaintiff that the appeal process postponed the commencement of the limitation period.
- [105] I note that on a motion for summary judgment, the responding party is required to put its best foot forward. The plaintiff’s evidence in this case falls short of rebutting the presumption or the evidence of the defendant.
- [106] Ms. Hassan is a lawyer. The evidence discloses that she practiced as duty counsel in criminal and family matters. There are limitation periods that apply to family law cases. Ms. Hassan in her cross-examination acknowledged that she understood limitation periods generally, and that in Ontario the limitation period is two years.
- [107] Furthermore, the Consultant’s evidence is that Ms. Hassan mentioned hiring legal counsel as of October 16, 2017. That evidence is uncontroverted, although Ms. Hassan does not recall whether or not she stated that. Her doctor’s note dated October 30, 2017, references Ms. Hassan wishing to commence legal proceedings against Sun Life.
- [108] Additionally, Ms. Hassan acknowledges her handwritten notes on her copy of the letter from Sun Life dated September 1, 2017, which was provided by her to her physician. Ms. Hassan has placed a “star” on the paragraph referring to the limitation period and underlined the “Limitations Act, 2002”, as well as written the words “Limitations Act” on the page. She has also circled deadlines by which she was to submit information for her appeal (September 22, 2017).
- [109] Finally, Ms. Hassan’s email to the Consultant dated February 14, 2018, in which she uses the Re: line “Limitation Date” demonstrates that Ms. Hassan was alive to the fact that there was a limitation date that applied to her case.
- [110] I find as a fact that as of the date that Ms. Hassan received the September 26, 2017 letter, she knew that an action was an appropriate means to remedy Sun Life’s denial of her LTD claim. Even were I to find otherwise, a reasonable person with Ms. Hassan’s abilities and

in her circumstances—a trained lawyer in receipt of Sun Life’s letter dated September 26, 2017—would have known all of the elements of s. 5(1)(a)(i)-(iv).

- [111] Accordingly, I find that the date that the claim was “discovered” was the day Ms. Hassan received the letter dated September 26, 2017, from Sun Life. In this case, the date upon which Ms. Hassan first discovered the claim coincides with the date on which a reasonable person with her abilities and in her circumstances first ought to have known all the elements listed in s. 5(1)(a) of the *Act*.
- [112] In my view, the date upon which Ms. Hassan sought legal advice is a red herring. Limitation periods are not postponed until legal counsel is retained, rather they commence when the claim is discovered. It would inject uncertainty into discoverability if a limitation date was established based on the timing of a lawyer’s retainer. This would undermine the holding in *Markel*.
- [113] On that issue, this case closely resembles *Kumarasamy*. The evidence establishes that Ms. Hassan retained Ms. Fisher in the fall of 2017, although this was in respect to her employment at Legal Aid Ontario. Ms. Fisher, by February of 2018, was assisting Ms. Hassan with her claim for LTDs and I find that it makes no difference whether it was for the internal appeal or with the specific intention to sue Sun Life. Ms. Fisher was retained to assist with the LTD claim.
- [114] Finally, this is not a case in which there can be any argument that Sun Life, by its conduct, misled Ms. Hassan into thinking that the limitation period would not apply. I disagree with the assertion that Sun Life’s references to the limitation period were “vague” or that it was necessary to refer to specific sections of the *Limitations Act, 2002*.
- [115] To the contrary, Sun Life, at every opportunity, brought to Ms. Hassan’s attention that there was a limitation period that applied and that by considering her appeal, Sun Life was not waiving the limitation period. This was unambiguously stated in Sun Life’s initial denial letter of September 26, 2017, and in its subsequent written communication dated December 4, 2017, December 13, 2017, and February 15, 2018.
- [116] There was nothing equivocal about Sun Life’s reliance upon the limitation period throughout.
- [117] In *Clarke*, the Court of Appeal noted that the motion judge had not made the requisite findings of fact with respect to “appropriate means”. The Court of Appeal did not find it appropriate to exercise its fact-finding powers. Unlike in *Clarke*, I find that I am able to make the requisite factual findings. Again, a significant distinguishing feature in that case was that the limitation period was only mentioned in the insurer’s final denial letter.
- [118] Accordingly, I find that I can reach a fair and just determination that the plaintiff commenced the within action after the expiration of the two-year limitation date. The evidence adduced allows me to find as a fact that the plaintiff’s claim “ripened” when she

received Sun Life's letter dated September 26, 2017, and the limitation period commenced at that time. That occurred more than two years prior to the commencement of this action.

[119] I also find that I can apply the law to those facts and that summary judgment in favour of the defendant is the more expeditious and least expensive means to achieve a just result. There is no genuine issue requiring a trial that this action is statute barred by the *Limitations Act, 2002*.

[120] Furthermore, it was not necessary for the court to resort to the enhanced fact-finding powers provided in rule 20.04(2.1). The record was sufficient without doing so.

[121] For those reasons, I grant the defendant's motion for summary judgment and dismiss the plaintiff's action as statute barred under the *Limitations Act, 2002*.

**Disposition:**

[122] For the above reasons:

- (a) the defendant's motion to dismiss the action based on late service of the statement of claim is dismissed;
- (b) the plaintiff's cross-motion to extend the time for service of the statement of claim is granted and service of the statement of claim is hereby validated; and
- (c) the defendant's motion for summary judgment is granted and the plaintiff's action is hereby dismissed.

[123] If the parties are unable to agree on the costs of the motion and the action, the defendant shall serve and file written submissions no longer than two pages double spaced by no later than January 19, 2024. The plaintiff shall provide responding written submissions within the same parameters by no later than January 31, 2024. The parties should append bills of costs and any pertinent offers in addition to the written submissions. Cost submissions can be emailed to [Grace.Griffin@ontario.ca](mailto:Grace.Griffin@ontario.ca), and filed on OneDrive and Caselines.

**"Justice S. Nicholson"**  
Justice Spencer Nicholson

Date: December 29, 2023